Council Paper on proposed new E.O. 12/77

TAB 1

SECURITY INFORMATION OVERSIGHT OFFICE

We believe this proposal is desirable. The ICRC, existing nominally under the NSC, has not had a substantial base or support. Further, it is a committee of department representatives charged with monitoring, supervising and acting on appeals from their own and other agencies. The new entity, not being a committee, could act with more efficiency and dispatch than does the ICRC, while agencies' views will be made available through the newly established "Inter-Agency Advisory Committee."

The new SIOO would continue to have authority to monitor performance of agencies in implementing the Executive Order, requiring reports, conducting inspections, etc.

A significant change in the appellate authority of the new SIOO as compared to that of the ICRC is proposed. Under Executive Order 11652, anyone may request from any agency a copy of any classified document. If the document is at least 10 years old and the agency at an initial and an appeal level declines to declassify, the requestor may appeal that agency denial to ICRC. The appeal authority of SIOO would be limited to documents of two categories:

(a) classified documents of any age which are in Presidential libraries, and

(b) any instance in which the Director of SIOO "determines that continued classification of a document would represent a significant abuse or violation of the Order."

Abolition of appellate authority for over 10 year old documents of agencies would appear to be a step backwards in the effort to make more information available to the public. In fact, however, under Executive Order 11652 and the Freedom of Information Act, all documents, whether 10 years old or not, may be appealed to the courts. Further, the practice has been that very little recourse to ICRC has been had except by a few scholars and in many cases, ICRC has upheld the decisions of the denying departments. And finally, it is anticipated that the discretionary authority in the Director of the SIOO will suffice to provide sufficient protection for requests from the public.

TAB 2

SANCTIONS

There is no significant change in this proposal from the current situation. The May 1972 NSC Implementing Directive (at section X-D) charges departmental committees with "responsibility for recommending to the head of the respective departments appropriate administrative action to correct abuse or violations of any provision of the Order or Directives thereunder, including notifications by warning letter, formal reprimand, and to the extent permitted by law, suspension without pay and removal. Upon receipt of such a recommendation, the head of the department concerned shall act promptly and advise the departmental committee of his action." The proposed change makes it clear that sanctions are to be available for unauthorized disclosures, as well as for overclassifying. It also permits agency heads to specify the violations of the Order which warrant disciplinary action.

Recommend acceptance of this proposal.

TAB 3

SECRECY AGREEMENTS

The Ad Hoc Committee recommendation reflects the view that it would be difficult, if not impossible, to reach agreement among agencies on the terms of a mandatory secrecy agreement. It also takes into account the problems which would be caused by a decision requiring new secrecy agreements of current employees, particularly those who have already signed such an agreement (all CIA employees are in this category). Some employees, including highly valuable employees, might refuse; some agencies lack this authority to terminate because of such refusal; termination of CIA employees for refusal to sign would be a questionable use of the Director's broad termination authority in the National Security Act, etc.

The recommendation would permit agencies to opt not to require secrecy agreements, to require employees to sign agreements developed by the Agency or to require signature to the uniform agreement to be developed by the new SIOO. It is believed this is the strongest position which can be accepted and it is recommended that the Director support it.

TAB 4

COMPARTMENTATION ARRANGEMENTS

In the work of the Ad Hoc Committee and its subcommittees, it was noted that there are numerous compartments throughout agencies (DoD is said to have hundreds) and it was noted that maintenance and use of compartments is expensive. It was recognized also, however, that compartments are useful devices to implement and enforce the need-to-know rule and the rule requiring that classified information be made available only to persons determined to be trustworthy. The recommendation is designed to make certain that compartments are established only upon the careful determination by the agency head and that he do so only when he determines that normal safeguarding procedures would be inadequate, the number of people having access under a given compartment is reasonable, and that the "special access controls balance the need to protect the information against the full spectrum of needs to use the information." This somewhat unclear language is intended to convey the thought that compartments must not serve to deny information to those who have a need for it. Under the proposal, each compartment would terminate in three years unless renewed.

It is believed the recommendation is desirable in that it reserves to the Director and other agency heads the authority to establish such systems, but also assures that he will do so only on his determination in each case that the cost, access and other factors warrant the use of such a system and that the need for continuing existing compartments will be reexamined every three years.

TAB 5

INFORMATION WARRANTING PROTECTION

This recommendation continues the current definition of national security information, i.e., the definition of information which must be protected. That definition is information "which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States." This definition, with minor variation, has been in use for over 20 years and is now well known. It was suggested by the DCI representative that the definition be modified to specifically include intelligence sources and methods. There were other proposals for modifying it to include such things as information concerning terrorism, narcotics traffic, etc. Because the current definition is well known and because an expansion was thought likely to bring on public and perhaps congressional criticism, it was decided to propose continuation of the current definition. In addition, the Order is to include criteria by which agencies and personnel would determine that information is or is not classifiable national security information. The criteria would make specific reference to intelligence sources and methods information. Recommend support to this proposal.

Recommendation 5 on page 2 also proposes that agencies whose experience indicates very little need for classification authority should not be given such authority. When such an agency has a need to classify, it would request the SIOO to classify the indicated documents.

TAB 6

PARAGRAPH CLASSIFICATION MARKINGS

The current NSC Directive requires that whenever a classified document contains both classified and unclassified information "each section, part or paragraph, should be marked to the extent practicable to show its classification category or that it is unclassified." Some agencies have been diligently complying with this requirement and recently CIA ussued a Notice requiring compliance. The special value of paragraph marking is that it drastically reduces the work when declassification review is undertaken. Recommendation 6 would require paragraph classification markings, except that the head of a department could seek a waiver from the oversight office for "specific situations or classes of information."

The DCI and ERDA representatives voted to continue the present provision of Executive Order 11652, that is, paragraph classification markings be required "to the extent practicable." It was our thought that this matter does not warrant the attention of agency heads and the Oversight Office. It does not seem a matter of major importance, in any event.

TAB 7

REQUESTS FOR DECLASSIFICATION REVIEW OF DOCUMENTS LESS THAN 10 YEARS OLD

Under the existing Order, requests to agencies by individuals for declassification of documents which are less than 10 years old, need not be acted upon. The Freedom of Information Act, however, requires that they be acted upon and the CIA regulation, for example, provides that a request received under the Order or the Act (or without reference to any legal authority) must be reviewed for declassification regardless of the age of the document. Recommendation 7 therefore would simply bring the Executive Order provision into conformity with the FOIA and, as mentioned, into conformity with the existing CIA practice. It is recommended that this proposal be supported.

Recommendation 7 notes also that the deadline for agency action on a request for declassification review as provided by Executive Order 11652 would remain. Under that Order, agencies are to act within 30 days and, upon a failure to respond within 60 days, the requestor may appeal to ICRC. Retaining those time limits would seem desirable and would permit the head of SIOO to exercise his discretionary authority to review an agency action. See the discussion of the SIOO appellate authority at Tab 1.

TAB 8

CLASSIFICATION OF INFORMATION

Under Executive Order 11652, information classified Top Secret, reduces to Secret in 2 years, Confidential in 4 years and declassified automatically at the end of 10 years; similar provisions apply to original Secret and Confidential information also. At the time of classification, documents may be exempted from the automatic declassification (General Declassification Schedule), but only by an official who has authority to classify at Top Secret. Generally, only senior officials have this authority and the concept was that subordinates would initiate exemption decisions only in fully warranted situations. In practice it has not worked. I believe many CIAers do not understand the rules. Also, it is difficult to get to senior officials on matters of this nature. It is believed that, in CIA, nearly all classified documents are also marked exempt and that these exemption decisions generally are not made by authorized personnel. Under the Order, exempted documents declassify in 30 years unless the agency head personally continues the classification.

The recommendation would abolish the automatic downgrading of classification, in the belief that that is a meaningless action. The 10 year period reduces to 6, the 30 years reduces to 20.

Both the 6 and 20 year requirements would cause problems for intelligence agencies, but I believe could be lived with. The 20 year provision probably could not be avoided, in view of the 20 year mention in the PRM. It is suggested that we oppose the change from 10 to 6 years for automatic declassification, for the reason that a large portion of intelligence information - particularly sources and methods information - has to be protected well beyond 6 years.

TAB 9

CLASSIFICATION CRITERIA

There are several points for consideration in the proposal for classification criteria:

(a) It was felt that prescribing specific criteria, at least one of which would have to be applicable in order to classify a particular document, agencies and personnel would be assisted in making the decision that given information would or would not damage national security, if disclosed.

(b) Specific areas of information will be brought within the concept of information the disclosure of which would damage national security and thus require classification. There has been some feeling that the identity of sources or of covert CIA personnel possibly does not warrant classification. There is some thought that terrorism and narcotics traffic should be provided for by criteria.

(c) The use of criteria avoids expanding the definition of national security information

Recommend support for this recommendation, but it might be well to join State and ERDA in reserving until the criteria language is drafted by those who draft the proposed new Executive order.

TAB 10

PROHIBITIONS AGAINST IMPROPER CLASSIFICATION

Executive Order 11652 provides that:

"Both unnecessary and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security."

Believe the proposal is unobjectionable - but also unnecessary. I would reserve on the issue of expansion, pending the availability of the proposed language.

TAB 11

DECLASSIFICATION

Under Executive Order 11652, agencies are required to systematically review 30 year old documents for declassification, or continued classification. The recommendation (paragraph 1 of page 4) would change this to 20 years. Documents not now marked for declassification in 20 years would be reviewed for declassification "in accordance with declassification guidelines promulgated by heads of departments" (paragraph 2 of page 4). It would provide also that only "permanently valuable records be reviewed." And finally, declassification authority is to be given to officials "at the lowest practicable echelon."

Subject to one point, it is recommended that the proposals be supported. That one point goes to the question of the period of continued classification. Agency and Intelligence Staff representatives are very concerned that much intelligence-related information must be protected well beyond 20 years. We made this point at the Ad Hoc Committee and it was well understood that the "declassification guidelines" to be promulgated by department heads could prescribe the periods of continued classification. I believe this point should be made clear and insisted upon.

TAB. 12

FOREIGN (GOVERNMENT) INFORMATION PROVIDED TO THE UNITED STATES

Both State and the intelligence agencies, particularly CIA, feel this problem is of extreme importance. State insisted that the new Executive order must contain language which they could cite to foreign governments to show that the agencies have the authority to protect secrets. The kicker in the recommended language is that information provided by a foreign government or international organization in confidence is classifiable "as long as the information falls within the general classification criteria," i.e., as long as disclosure would damage national security. The foreign government or foreign source might take little comfort in that language because he cannot know that the United States recipients - and other United States personnel who have declassification authority - would conclude that disclosure would damage national security.

I suggest the words "as long as the information falls within the general classification criteria" be deleted and the proposal, as amended, be strongly supported. The deletion in effect would decree that information furnished by a foreign government in confidence is information the disclosure of which would damage national security.

It may be argued that some information is furnished in confidence which is of no consequence to national security. The answer would be that United States officials of course will apply reasonable standards.

TAB 13

STANDARDS FOR DETERMINING TRUSTWORTHINESS

There is considerable background to the Ad Hoc Committee's proposal in this area.

Some two years ago the Domestic Council initiated a study, in which Dod took the lead, to review Executive Order 10450, which is a 20-some-year-old Order prescribing security standards for government employment and for access to classified information. CIA and the intelligence agencies were not invited to participate, and there was some feeling that this was done deliberately. In any event, a draft of a new Executive order in that area was developed and was formally circulated by OMB in the latter months of the Ford Administration. CIA and other agencies voiced a number of objections, and the draft order was not submitted to the President, and of course was not issued. CIA objections were that the order impinged on the Director's authority to establish security standards for access to sources and methods information, the standards for security clearances were not sufficiently high, the order possibly impinged on the Director's authority to reject applicants and to terminate employees, etc.

In the course of the deliberations by the subcommittees of the PRM-29 Ad Hoc Committee, DoD again proposed that the order to replace Executive Order 11652 also would establish standardized procedures for determining trustworthiness. Over DoD's objections, the Ad Hoc Committee concluded that this suggestion was not properly within the PRM-29 charter, but that the current review of last year's work on Executive Order 10450 by OMB and the Civil Service Commission, and the executive branch agencies generally, should be accelerated and Executive Order 19450 should be modernized and reissued at an early date.

Recommend support for this proposal.

TAB 14.

20-YEAR SYSTEMATIC DECLASSIFICATION
(pp. 6-7)

Executive Order 11652 requires that classified documents be reviewed for declassification when they become 30 years old. Pages 6 and 7 discuss the pros and cons of a decision to change that to 20 years. It is generally agreed that a 20 year requirement would advance the cause of openness, but there are cost and risk questions. Also, there is some concern that information furnished by foreign governments should be subject to different rules.

One proposal is that agencies draw up guidelines which the Archivist would use in reviewing by sampling or survey techniques. When the survey revealed sensitive information, the Archivist, in consultation with the agency head, would determine whether to proceed with document-by-document review.

The other proposal, supported by CIA, calls for document-by-document review.

The Ad Hoc paper recognizes that the relative costs in the two procedures is hard to estimate. The risk of disclosing information which should remain protected is also hard to judge.

I believe we must insist on authority to review document-by-document. It seems probable that the classified files of intelligence agencies would include numerous identifications of sources and methods, etc. which must remain protected.

The Ad Hoc paper indicates some agencies would handle declassification review of information furnished by foreign governments under the same rules as for other classified information. Others - including State and the DCI - would opt for document-by-document review, based on guidelines developed in conjunction with the foreign governments. (The Ad Hoc paper indicates the DCI representative [redacted] believed these documents should be declassified on the basis of United States guidelines. In fact, it seems to me essential that the United States establish guidelines only in consultation with the foreign governments.) STAT

As a practical matter, perhaps the SCC should decide that the Executive order should not specify the review procedures, but should set

dates for completion of reviews and leave it to the agencies to determine their own procedures, based on the nature and sensitivity of the information, resources available, etc. It would be foolish to require agencies to continue to use document-by-document review procedures if experience shows that only a microscopic percent require continued classification.

TAB 15

CLASSIFICATION GUIDELINES

It is proposed that agencies issue guidelines to assist personnel in making classification decisions. Some agencies would require such guidelines, others would encourage but not require the issuance of guidelines. On balance, I would favor the latter.

TAB 16

BALANCING TEST

The issue is whether to require classifiers to weigh the damage to national security against the desirability of public access. As indicated, the national security agencies, including the DCI, are opposed. The proposal seems to me unworkable. It is desirable that all government information be made public. For various reasons, some, including national security information, cannot be. To require the DoD or NSC official, for example, to determine the relative claims of national security and the public's right to know is an impossible burden. Further, it would vastly complicate and hamper the government's position in litigation.

In the Ad Hoc deliberations, Jutice favored the balancing test. However, the Chief of Information and Privacy Section, Civil Division, Department of Justice, has forwarded to the Ad Hoc chairmen a letter (attached hereto) urging that the balancing test would be difficult, burdensome and unworkable.

Recommend the balancing test be rejected.

THE WHITE HOUSE

WASHINGTON

July 20, 1977

MEMORANDUM FOR

PRM/NSC-29 AD HOC COMMITTEE MEMBERS

FROM: ROBERT GATES RG
RICHARD NEUSTADT RN

SUBJECT: Balancing Test

Interest was expressed at the Ad Hoc Committee meeting last week in obtaining the views of Mr. Jeffrey Axelrad, Chief of Justice's Information and Privacy Section, Civil Division, concerning the adoption of a "balancing test" in the new Executive Order. Mr. Axelrad's personal views are presented in the attached memorandum, which is forwarded for your information.

Mr. Axelrad's comments have been offered with the understanding that they are not to be regarded as the official Justice Department position on this issue.

Attachment

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

July 20, 1977

Address Reply to the
Division Indicated
and Refer to Initials and Number

Dr. Robert Gates
National Security Counsel Staff

Mr. Richard Neustadt
Domestic Policy Staff
The White House

Dear Dr. Gates and Mr. Neustadt:

This confirms my July 19, 1977 conversation with Gary Barron of your office. Mr. Barron advises that a proposal is under consideration to include in a revised Executive Order on the classification of documents a provision to the effect that the classifying official shall balance the Public's need to know against the national security concerns under consideration. Mr. Barron inquired as to my opinion of the effect of adoption of this proposal. In my opinion, the proposal would be hopelessly impracticable to administer. More specifically, I doubt whether the Courts would conclude that an Executive Order including such a provision would specifically authorize any material to be kept secret within the meaning of 5 U.S.C. §552(b)(1)(A). Additionally, the scope of litigation under the FOIA, in particular 5 U.S.C. §552(b)(1)(B), would be broadened. I believe that the inclusion of such a provision would enable plaintiffs to generally test the desirability of any particular course chosen in the interest of national security. At best, the proceedings, including discovery proceedings, would be complex and difficult to keep within confined channels. At worst, and it is a real possibility, the provisions would enable our Nation's foreign policy and defense policy to be set by FOIA plaintiffs and by District Court judges, rather than by the Executive Branch.

It is my understanding that you are continuing to consider this matter and will discuss this with other persons within the Department of Justice.

Sincerely,

Jeffrey Axelrad

Jeffrey Axelrad
Chief, Information & Privacy Section
Civil Division

JA:sv